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JAYANDRAN SUBRAMANIAM v. RAJAPRAKASH RAGHAVAN & ORS

COURT OF APPEAL, PUTRAJAYA
COLLIN LAWRENCE SEQUERAH JCA
FAIZAH JAMALUDIN JCA
B EVROL MARIETTE PETERS JCA
[CIVIL APPEAL NO: B-02(NCVC)(W)-134-01-2024]
27 OCTOBER 2025

C **Abstract** – *Contemporaneous documents, such as powers of attorney, sale and purchase agreement, trust deeds, and statutory declarations, created at the time of the sale transaction, carry greater probative weight than oral testimony given decades later. Where there is a conflict between the two, the court ought to prefer the contemporaneous documents unless there are compelling reasons not to. A failure to properly analyse and give due weight* D *to these contemporaneous documents constitutes insufficient judicial appreciation of the evidence and warrants appellate intervention.*

CIVIL PROCEDURE: *Appeal – Appeal against judgment of High Court – Two friends ('Ramaney and Raghavan') purchase lots of land jointly, with arrangement* E *lots would later be divided equally ('Lots 2259 to 2264') – Lots 2259 to 2261 given to Ramaney, while Lots 2262 to 2264 given to Raghavan – Children of Raghavan ('children') claimed they were sole owners of Lots 2259 to 2261, and argued Ramaney was holding onto them as trustee – High Court ruled in favour of children – Whether appellate interference warranted – Whether there was insufficient judicial* F *appreciation of documentary evidence – Whether undue weight had been placed on oral testimony of witnesses – Whether there was misdirection of standard and burden of proof*

CIVIL PROCEDURE: *Judgments and orders – Appeal against judgment of High Court – Two friends ('Ramaney and Raghavan') purchase lots of land jointly, with* G *arrangement lots would later be divided equally ('Lots 2259 to 2264') – Lots 2259 to 2261 given to Ramaney, while Lots 2262 to 2264 given to Raghavan – Children of Raghavan ('children') claimed they were sole owners of Lots 2259 to 2261, and argued Ramaney was holding onto them as trustee – High Court ruled in favour of children – Whether appellate interference warranted – Whether there was* H *insufficient judicial appreciation of documentary evidence – Whether undue weight had been placed on oral testimony of witnesses – Whether there was misdirection of standard and burden of proof*

The plaintiff was the executor of the estate of one Ramaney, while the defendants were the children of one Raghavan. Ramaney and Raghavan were I friends. In 1976, they jointly purchased three lots of land in Banting, namely Lots 1238, 1239, and 1261 ('original three lots'). Ramaney was registered as the sole owner of the original three lots, with the understanding that, after

registration, the original three lots – or the proceeds from their sale – would be divided equally between Ramaney and Raghavan. The sale of the original three lots was affected pursuant to two powers of attorney: one dated December 1975 ('POA December 1975') and the other dated September 1976 ('POA September 1976'). These POAs had been executed by the registered proprietor of the original three lots, VM Kandasamy. VM Kandasamy's wife, Thanama, was appointed as the attorney for the sale. In September 1976, to effect the sale, Thanama entered into a sale and purchase agreement ('SPA') with Ramaney and one Ellusamy, who acted on behalf of Raghavan. After Raghavan's death, Ramaney executed three trust deeds which purportedly documented that he was holding Raghavan's half-share in the original three lots on behalf of the defendants, the children of Raghavan. Pursuant to a Government land acquisition, the original three lots were subdivided into six lots, namely Lots 2259 to 2264. The defendants signed statutory declarations ('SDs') acknowledging Ramaney's half-share in the six lots. Ramaney then transferred Lots 2262 to 2264 to the defendants, leaving them with a balance of 1,114sqm across Lots 2259 to 2261. Subsequently, Ramaney entered into an agreement to sell Lots 2259 to 2261 to a purchaser, one Sivapathy. As the defendants were the owners of 1,114sqm across these lots, their consent and signatures were required to effect the partition. However, the defendants refused to provide such. Consequently, the sale of Lots 2259 to 2261 could not be completed. Ramaney then commenced an action, *via* an originating summons, against the defendants, seeking a declaration to confirm his ownership of Lots 2259 to 2261, and any further or consequential relief necessary to give effect to the sale of these lots to Sivapathy. After Ramaney obtained a court order in his favour ('March 2021 order'), he took steps to effect the registration of Lots 2259 to 2261 in Sivapathy's name. However, the Land Office declined to register the transfer, on the ground that the March 2021 order was vague. Hence, Ramaney applied to court seeking clarification of the March 2021 order. March 2021 order was thereafter set aside, and the proceedings were converted into a writ action. In the writ action, Ramaney sought, *inter alia*, a declaration that he was the lawful owner of Lots 2259 to 2261, and that the defendants' legal interest should be limited to the 1,114sqm. This prompted the defendants to file a counterclaim seeking, *inter alia*, a declaration that they were the sole owners of Lots 2259 to 2261. During the pendency of these proceedings, Ramaney passed away, and the proceedings were taken over by the plaintiff. By amending Ramaney's statement of claim, the plaintiff sought, *inter alia*, an order that he be registered as the executor of Ramaney's estate, and that the relevant authorities give effect to such registration by reflecting the ownership accordingly on the title. The plaintiff also sought an order that the defendants' beneficial interest in the 1,114sqm be sold to him at the prevailing market value. This was dismissed by the High

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Court, while the defendants' counterclaim was allowed. Aggrieved, the plaintiff filed the present appeal. In this appeal, the following issues arose: (i) whether there had been insufficient judicial appreciation of the documentary evidence by the High Court; (ii) whether undue weight had been placed by the High Court on the oral testimony of the defendants in light of the contemporaneous documents; and (iii) whether the High Court had misdirected the burden and standard of proof applicable on the parties.

Held (allowing appeal with costs)
Per Evrol Mariette Peters JCA delivering the judgment of the court:

(1) In relation to POA December 1975, the High Court had appeared to have regarded it as not raising any substantive issue for determination at trial. It was treated primarily as a procedural instrument to facilitate the sale on behalf of VM Kandasamy, rather than as evidence directly relevant to the question of who had provided the purchase consideration and who had held the beneficial interest. Regarding POA September 1976, while reference was made to cls. 24 and 25 of the same, these provisions did not appear to have been applied in relation to the factual matrix of the case. These clauses should had been merited closer consideration, as they constituted contemporaneous documentary evidence which suggested that Ramaney himself had paid the purchase money to Thanama. (paras 19-23)

(2) The POAs were contemporaneous documents created at the time of the purchase of the three original lots by Ramaney. The law generally affords greater weight to such documents than to oral testimony or documents created long after the purchase, as these documents would reflect the intentions of the parties at the material time. The absence of a specific finding on the legal effect of cls. 24 and 25 of the POA September 1976 had left an aspect of the reasoning that required further examination. (para 25)

(3) The SPA should have been considered by the High Court. The admissibility of the SPA was supported by s. 73A(2) and (5) of the Evidence Act 1950 ('EA'). Upon perusal of the grounds of judgment ('GOJ'), although the High Court had referred to the SPA, it appeared that the SPA had not been evaluated in the context of the facts and circumstances of the case. A holistic examination of the SPA, in conjunction with the documentary evidence adduced, could have compelled the conclusion that Ramaney was the beneficial owner of a one-half share in the original three lots. (paras 26, 30, 32 & 33)

(4) The express wordings '1. RAMANEY A/L RAMU … ½ shares' should have been construed as a clear and unequivocal quantification of Ramaney's beneficial interest in the lands. On a plain reading, the trust deeds acknowledged Ramaney's pre-existing ownership of a one-half

share, while simultaneously providing that he was to hold the remaining one-half share, being the defendants' portion inherited from their late father, in trust for them until they attained the age of majority. To construe the trust deeds otherwise, as had been done by the High Court, namely, as requiring Ramaney to hold even his own beneficial share on trust for others, would give rise to conceptual inconsistencies and legal impossibilities, as it would effectively compel a trustee to hold his own property on trust for himself and third parties. (para 36)

(5) The transfer of Lots 2262 to 2264 ('2010 transfers') could be understood in another light, namely as a practical partition of the jointly held property, whereby the defendants received Lots 2262 to 2264 in exchange for their interest in the remaining three lots. Such an arrangement is a common method of division among co-owners and sat consistently with the trust deeds. Ramaney's later attempt to partition Lots 2259 to 2261 had lent further support to this construction. Seen this way, the 2010 transfers were not indicative of trusteeship over the entirety but was aligned with co-ownership by Ramaney and Raghavan and partition pursuant thereto. (para 39)

(6) The 2010 transfers were supported by the SDs in which the defendants acknowledged Ramaney as the 'beneficial owner of the ½ shares' in Lots 2263 and 2264, thereby recognising Ramaney's right to transfer those shares. The SDs corroborated Ramaney's account of joint ownership and division of the shares in Lots 2259 to 2264. These documents warranted greater consideration, as they clearly lent support to the plaintiff's claim. (paras 40 & 41)

(7) The documentary evidence adduced by the plaintiff was not accorded the weight and judicial appreciation it deserved. A proper and holistic evaluation of the evidence, in the light of the surrounding circumstances, could have compelled the High Court to arrive at a different conclusion. (para 42)

(8) The POAs, SPA, trust deeds and SDs were all executed contemporaneously with the events and thus carried inherent probative value. From the GOJ however, it appeared that the High Court had placed greater emphasis on the recollections and assertions of the witnesses, which contradicted the documentary evidence and raised issues of credibility. The proper approach, as settled by authority, is that where oral testimony is inconsistent with documentary evidence, the latter must prevail unless there are compelling reasons to disregard it. The failure to give precedence to the documents led to findings of fact that were unsustainable in law and resulted in a miscarriage of justice. (paras 46 & 47)

(9) The defendant's case was premised on witnesses recounting what Raghavan had allegedly told them years earlier. Such statements constituted hearsay as they were adduced to prove the truth of what was asserted, and not from the witnesses' own direct knowledge. *Via* s. 60 of the EA, hearsay of this nature is inadmissible and carries no probative value. Even if such oral testimony was admissible, the reliability of such testimony was highly questionable, for it was difficult to conceive how the witnesses could accurately recall the precise details of a conversation said to have taken place decades ago. (paras 50-52)

(10) The burden was not on the plaintiff to prove Ramaney's half share beneficial ownership, as that had been established by the contemporaneous documents. Rather, the burden was on the defendants to prove, on a balance of probabilities, that they were the beneficiaries of the whole share of the six lots. The High Court had imposed inaccurate principles relating to the burden and standard of proof on the plaintiff. The High Court had arrived at findings that were inconsistent with the evidence. (paras 60 & 61)

(11) The appeal was allowed with costs. The defendants' beneficial interest measuring 1,114sqm across Lots 2259 to 2261 was ordered to be sold to the plaintiff at market value within six months, which shall be determined by a certified valuer appointed by the plaintiff at his own cost. In the events the defendants failed or refused to execute the requisite documents of transfers, the Registrar of the court shall be authorised to execute the same on their behalf. (paras 62 & 63)

Case(s) referred to:

Arab-Malaysian Merchant Bank Bhd v. Chong On Foh Medical Hall & Liquor Dealers [1996] CLJU 113; [1996] 1 LNS 113 HC ***(refd)***

Armagas Ltd v. Mundogas SA (The Ocean Frost) [1985] 1 Lloyds Rep 1 ***(refd)***

Bank Of Tokyo-Mitsubishi (Malaysia) Bhd v. Sim Lim Holdings Bhd & Ors [2001] 2 CLJ 474 HC ***(refd)***

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Chow Yee Wah & Anor v. Choo Ah Pat [1978] CLJU 32; [1978] 1 LNS 32 PC ***(refd)***

Dato' Sri Mohd Najib Hj Abd Razak v. PP [2022] 1 CLJ 491 CA ***(refd)***

Eastern & Oriental Hotel [1951] Sdn Bhd & Anor [1951] Sdn Bhd v. Ellarious George Fernandez & Anor And Another Case [1988] 2 CLJ 734; [1988] 1 CLJ (Rep) 50 SC ***(refd)***

Ikris Bina Sdn Bhd v. Jianseng Construction Sdn Bhd [2019] CLJU 1662; [2019] 1 LNS 1662 HC ***(refd)***

Kubota Agricultural Machinery Sdn Bhd v. Sharizan Sdn Bhd & Anor; Sharizan Sdn Bhd & Ors (Third Parties) [2001] 6 CLJ 104 HC ***(refd)***

Muttar Masngud v. Lim Kim Chet & Anor [1982] CLJ 107; [1982] CLJ (Rep) 237 FC ***(refd)***

Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd [2017] 5 CLJ 58 CA ***(refd)***

Paya Terubong Estates Sdn Bhd v. Pusaka Warisan Sdn Bhd [1998] 2 CLJ 909 CA ***(refd)***

PP v. Dato' Sri Mohd Najib Hj Abd Razak [2020] 8 CLJ 319 HC ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] CLJU 119; [1979] 1 LNS 119 FC ***(refd)***
UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***
Watt Or Thomas v. Thomas [1947] AC 487 ***(refd)***
Woon Ngee Yew & Ors v. Ng Yoon Thai & Ors [1940] CLJU 119; [1940] 1 LNS 119 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 60, 73A(2), (5), 103
Rules of Court 2012, O. 34 r. 2

For the plaintiff/appellant - Jude Alexander I Arulandu; M/s Alexander & Partners
For the defendants/respondents - Mohammad Izwan Azmi & Muhammad Amir Syazwan Ahmad Fauzy; M/s Izwan Mazniza Kamil & Assocs

[Editor's note: For the High Court judgment, please see Jayandran Subramaniam & Yang Lain lwn. Rajaprakash Raghavan & Yang Lain [2024] CLJU 506 (overruled).]

Reported by Syamim Ariffin

JUDGMENT

Evrol Mariette Peters JCA:

Introduction

[1] This appeal was brought by the plaintiff against the decision of the learned High Court Judge, who dismissed his claim and allowed the defendants' counterclaim. The plaintiff is the executor of the estate of one Ramaney a/l Ramu ("Ramaney"), whilst the defendants are the children of one Raghavan a/l Ellusamy ("Raghavan").

[2] The plaintiff and defendants (collectively "the parties") will be referred to in this judgment as they are referred to in the High Court.

The Factual Background

[3] About 50 years ago, two friends, Ramaney (a teacher) and Raghavan (a legal clerk), jointly purchased three lots of land in Banting in 1976, namely, Lots 1238, 1239 and 1261 ("the original three lots"), with Ramaney registered as the sole owner, on the understanding that the original three lots, or the proceeds of the sale of the same, would be divided equally between Ramaney and Raghavan.

[4] The sale was effected pursuant to two powers of attorney, one dated December 1975 ("POA December 1975") and the other dated September 1976 ("POA September 1976") (collectively "the POAs"), executed by the registered proprietor, VM Kandasamy. By virtue of the POAs, VM Kandasamy's wife, Thanama, was appointed as his attorney to sell the original three lots to Ramaney.

[5] In September 1976, Thanama, acting as an attorney for VM Kandasamy, entered into a sale and purchase agreement ("the sale and purchase agreement") with Ramaney and one Ellusamy for the sale of the original three lots. Ellusamy, the father of Raghavan, was acting on behalf of the latter in the transaction.

[6] After Raghavan's death in 1999, Ramaney executed three trust deeds ("the trust deeds") which purportedly documented that Ramaney was holding Raghavan's half-share for the defendants.

[7] In 2008, due to the land acquisition by the Government, the original three lots were subdivided into six lots (Lots 2259 to 2264).

[8] In 2010, the defendants had signed statutory declarations ("the statutory declarations") acknowledging Ramaney's half share in the lots. Ramaney then transferred only Lots 2262 to 2264 to the defendants, leaving them with a balance of 1,114 square metres across Lots 2259 to 2261.

[9] In 2016, Ramaney entered into an agreement to sell Lots 2259 to 2261 (excluding the 1,114 square metres) to a purchaser, one Sivapathy Maruthay ("Sivapathy"). As the defendants were the owners of the 1,114 square metres across Lots 2259 to 2261, their consent and signatures were required for the pre-computation plan to effect the partition. The defendants, however, had refused to provide their consent and signatures.

[10] As a consequence of the defendants' refusal, the sale of Lots 2259 to 2261 could not be completed. Accordingly, in December 2020, Ramaney commenced an action against the defendants by way of Originating Summons No. BA-24NCVC-1233-11/2020, seeking a declaration confirming his ownership of Lots 2259 to 2261 and such further or consequential reliefs as would give effect to the sale to Sivapathy.

[11] In March 2021, Ramaney obtained a court order in his favour ("the March 2021 order"), which remained unchallenged by the defendants. Pursuant thereto, steps were taken to effect registration of Lots 2259 to 2261 in the name of Sivapathy. However, the land office subsequently declined to register the transfer, taking the position that the March 2021 order was vague and insufficiently specific to give effect to the intended registration.

[12] In March 2022, Ramaney applied to court, seeking clarification of the March 2021 order, whereupon the defendants had challenged that order. The March 2021 order was subsequently set aside in December 2022, and the proceedings were converted into a writ action *via* BA-22NCVC-508-12/2022 ("the writ action").

[13] In the writ action, Ramaney sought, *inter alia*, a declaration that he was the lawful owner of Lots 2259 to 2261, and that the defendants' legal interest was confined to an area measuring 1,114 square metres across the said lots.

In response, the defendants filed a counterclaim seeking, *inter alia*, a declaration that they were the sole owners of Lots 2259 to 2261, together with damages, including general, exemplary, and aggravated damages.

[14] While the case was pending, Ramaney passed away in May 2023, and his executor was substituted as the plaintiff in September 2023. The plaintiff thereafter amended his statement of claim to seek, *inter alia*, an order that he be registered as the executor of the estate of Ramaney, and that the relevant authorities give effect to such registration by reflecting the ownership accordingly on the title. The plaintiff further sought an order that the defendants' beneficial interest in 1,114 square metres be sold to him at the prevailing market value.

[15] In January 2024, the High Court dismissed the plaintiff's claim and allowed the defendants' counterclaim (with the exception of the prayer for damages). The plaintiff appealed.

Issues

[16] The main issues for consideration were as follows:

(i) whether there was insufficient judicial appreciation of the documentary evidence adduced by the plaintiff;

(ii) whether undue weight had been placed on oral testimony of the defendants in light of contemporaneous documents; and

(iii) whether there was a misdirection in the application of the burden and standard of proof on the parties.

[17] The appeal was unanimously allowed for the following reasons.

Contentions, Evaluation, And Findings

Whether There Was Insufficient Judicial Appreciation Of Documentary Evidence

[18] Having carefully considered the grounds of judgment and the evidence adduced, we were with respect, unable to agree with the approach adopted by the learned High Court Judge in treating the documentary evidence, namely the POAs, sale and purchase agreement, trust deeds and statutory declarations.

[19] With respect to the POAs, the grounds of judgment by the learned High Court Judge had indicated that the POAs were not regarded as proof that Ramaney had utilised his own funds for the purchase.

[20] For instance, in relation to POA December 1975, the learned High Court Judge appeared to have regarded it as not raising any substantive issue for determination at trial. It was treated by the learned High Court Judge primarily as a procedural instrument to facilitate the sale on behalf of VM Kandasamy, rather than as evidence directly relevant to the question of who had provided the purchase consideration and, in turn, who held the beneficial interest.

[21] As for POA September 1976, while reference was made to cls. 24 and 25, those provisions did not appear to have been applied in relation to the factual matrix of the case.

[22] Clause 24 of POA September 1976 recorded that VM Kandasamy's wife, Thanama, acting as the attorney for VM Kandasamy, had acknowledged receipt of $12,480 from Ramaney for the sale of the lands. Clause 25 of POA September 1976, meanwhile, empowered Ramaney to sell or transfer the lands to any person or even to himself. Clauses 24 and 25 of POA September 1976 read:

> [24] In consideration of the sum of dollars Twelve Thounsand Four Hundred **RM12,480 only paid to me by my donee** and the sum of which is hereby acknowledged receipt for the sale of my lands held under EMR Nos 4040, 4039, and 4041 for Lots 1239, 1238 and 1267 all in the Mukim of Kelanang, District of Kuala Langat, Selangor and free from encumbrances.
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> [25] **To sell, transfer, charge, lease, mortgage to any person or persons or himself my above said lands** and for that purpose to sign and execute all transfers and other instruments necessary, and to collect the titles in respect of the said lands from the Collector of Land Revenue, Kuala Langat, Selangor.
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> (emphasis added)

[23] In our respectful view, cls. 24 and 25 of POA September 1976 merited closer consideration, as they constituted contemporaneous documentary evidence suggesting that Ramaney himself had paid the purchase money to Thanama, as the attorney of VK Kandasamy, the vendor.

[24] It appeared from the grounds of judgment of the learned High Court Judge that the POAs were treated primarily as administrative instruments to facilitate the transaction and subsequent management of the lands, rather than as documents evidencing any underlying financial arrangement between Ramaney and Raghavan.

[25] It must be borne in mind that the POAs are contemporaneous documents created at the time of the purchase of the lands by Ramaney. The law generally affords greater weight to such documents than to oral testimony or documents created long after the fact, as they reflect the intentions of the parties at the material time. The absence of a specific finding on the legal effect of cls. 24 and 25 of POA September 1976 had, in our view, left an aspect of the reasoning that required further examination.

[26] With respect to the sale and purchase agreement, although it was marked as ID5, we were of the view that the learned High Court Judge ought to have considered it for the following reasons.

[27] First, the mere fact that a document is marked "ID" does not, by itself, render it inadmissible.

[28] The procedure governing ID documents is well established. Since such documents are not classified as Part A or Part B documents under O. 34 r. 2 of the Rules of Court 2012, the party seeking to rely on them must demonstrate that they fall within one of the recognised exceptions to the rule against hearsay. Accordingly, documents marked as "ID" are not automatically excluded from consideration but remain subject to the provisions and safeguards of the Evidence Act. This was explained by Ramly Ali J (as he then was) in *Bank Of Tokyo-Mitsubishi (Malaysia) Bhd v. Sim Lim Holdings Bhd & Ors* [2001] 2 CLJ 474 in the following passage:

> ... At that stage of the proceedings, all those documents have to be marked as "ID" first, **but it does not stop the court from deciding on their admissibility at the end of the trial, *ie*, during submissions stage.** Section 73A(2) of the Evidence Act 1950 empowers the court to do so. The said subsection provides for the exercise of the power "at any stage of the proceedings, having regards to all the circumstance of the case". There is nothing to say that those documents cannot be admitted as evidence under s. 73A(2) just because they have only been marked as "ID".
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> (emphasis added)

[29] This approach was endorsed by both the High Court in *PP v. Dato' Sri Mohd Najib Hj Abd Razak* [2020] 8 CLJ 319 and the Court of Appeal in *Dato' Sri Mohd Najib Hj Abd Razak v. PP* [2022] 1 CLJ 491.

[30] In our view, the admissibility of the sale and purchase agreement was supported by s. 73A(2) and (5) of the Evidence Act, which provide as follows:

> Section 73A - Admissibility of documentary evidence in civil cases, *etc*
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> ...
>
> (2) In any civil proceedings, *the court may at any stage of the proceedings, if having regard to all the circumstances* of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence:
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> (a) *notwithstanding that the maker of the statement is available but is not called as a witness*; and
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> (b) notwithstanding that the original document is not produced, if, *in lieu* thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.
>
> ...

A (5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of subsections (1) to (4), *the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances*, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner, and, where the B proceedings are with assessors, the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason, it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

(emphasis added)

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[31] The discretion to dispense with the original document and its maker is prescribed by s. 73A(2) of the Evidence Act, and such discretion was exercised not only in *Bank Of Tokyo-Mitsubishi (Malaysia) Bhd v. Sim Lim Holdings Bhd & Ors* [2001] 2 CLJ 474, but also in *Arab-Malaysian Merchant* D *Bank Bhd v. Chong On Foh Medical Hall & Liquor Dealers* [1996] CLJU 113; [1996] 1 LNS 113, and *Kubota Agricultural Machinery Sdn Bhd v. Sharizan Sdn Bhd & Anor; Sharizan Sdn Bhd & Ors (Third Parties)* [2001] 6 CLJ 104.

[32] Secondly, upon perusal of the grounds of judgment of the learned High Court Judge, we observed that reference was indeed made to the sale and E purchase agreement, with the remark that "the document speaks for itself". However, it appeared that the learned High Court Judge had not evaluated the sale and purchase agreement in the context of the facts and circumstances of the case.

[33] In our considered view, a holistic examination of the sale and F purchase agreement, in conjunction with the documentary evidence adduced, would have compelled the conclusion that Ramaney was the beneficial owner of a one-half share in the original three lots.

[34] With respect to the trust deeds, the learned High Court Judge had observed the following relevant terms:

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... I will hold the land ... IN TRUST for the person and minor known as

1. RAMANEY A/L RAMU	½ shares
2. RAJAPRAKASH A/L RAGHAVAN	1/6 shares
3. VINOTHINI A/L RAGHAVAN	1/6 shares
4. POOVARAJA A/L RAGHAVAN	1/6 shares

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[35] In resolving this, reference to the "½ shares" was interpreted by the learned High Court Judge merely as identification of the portion held by Ramaney in his capacity as trustee, rather than as conferring beneficial I ownership upon himself. The phrase "in trust" was treated by the learned High Court Judge as the governing expression, and on that basis, the trust deeds were read as establishing a trust arrangement for the defendants only.

[36] In our respectful view, the express wording of the trust deeds – "1. Ramaney a/l Ramu ... ½ shares", should have been construed as a clear and unequivocal quantification of Ramaney's beneficial interest in the lands. On a plain reading, the trust deeds acknowledged Ramaney's pre-existing ownership of a one-half share, while simultaneously providing that he was to hold the remaining one-half share, being the defendants' portion inherited from their late father, in trust for them until they attained the age of majority. To construe the trust deeds otherwise, namely, as requiring Ramaney to hold even his own beneficial share on trust for others, would give rise to conceptual inconsistencies and legal impossibilities, as it would effectively compel a trustee to hold his own property on trust for himself and third parties.

[37] We further observed that the trust deeds provided as follows:

> I hereby declare that I will at the request and cost **of the said minor** upon attaining the age of majority transfer the above said property to such person or persons...
>
> (emphasis added)

[38] It was beyond dispute that the reference to the "minor" in the trust deeds was a reference to the defendants.

[39] We had also considered the interpretation of Ramaney's subsequent conduct in 2010. The transfer of Lots 2262 to 2264 in their entirety to the defendants was treated at the High Court as inconsistent with his claim to a ½ share and as supporting the view that he held the whole in trust. In our respectful view, the 2010 transfers may also be understood in another light, namely as a practical partition of the jointly held property, whereby the defendants received Lots 2262 to 2264 in exchange for their interest in the remaining three. Such an arrangement is a common method of division among co-owners and, in the present case, sat consistently with the trust deeds. Ramaney's later attempt to partition Lots 2259 to 2261 had lent further support to this construction. Seen this way, the 2010 transfers were not indicative of trusteeship over the entirety but was aligned with co-ownership by Ramaney and Raghavan and partition pursuant thereto.

[40] Furthermore, the 2010 transfers were supported by the statutory declarations in which the defendants had acknowledged that Ramaney was the "beneficial owner of the ½ shares" in the subdivided lands of Lots 2263 and 2264, thereby recognising Ramaney's right to transfer those shares. The relevant part of the statutory declarations read:

> ... dengan ini memberi kebenaran kepada RAMANEY A/L RAMU sebagai Pemegang Amanah No K/P ... untuk memindahmilik 1/6 bahagian saya kepada sesiapa sahaja.

[41] The statutory declarations corroborated Ramaney's account of joint ownership and division of the shares in Lots 2259 to 2264. In our respectful view, these documents warranted greater consideration, as they clearly lent support to the plaintiff's claim.

[42] We are of the considered view that the documentary evidence adduced by the plaintiff was not accorded the weight and judicial appreciation it deserved. A proper and holistic evaluation of this evidence, in the light of the surrounding circumstances would, in our judgment, have compelled the learned High Court Judge to arrive at a different conclusion from that which was ultimately reached.

Whether Undue Weight Had Been Placed On Oral Testimony Of The Defendants

[43] The next issue for determination was whether undue weight had been placed on the oral testimony of the defendants, notwithstanding the existence of undisputed contemporaneous documentary evidence adduced and referred to.

[44] In our respectful view, greater weight should have been placed on the contemporaneous documentary evidence, which provided a firmer foundation than oral testimony.

[45] It is trite that where documentary evidence exists, it provides a more reliable and objective account of the facts in issue. Oral evidence, on the other hand, is susceptible to infirmities such as memory lapses, exaggeration, or self-interest.

[46] In the present case, the material documents, including the POAs, sale and purchase agreement, trust deeds, and statutory declarations, were executed contemporaneously with the events and thus carried inherent probative value. However, from the grounds of judgment of the learned High Court Judge, it appeared that greater emphasis was placed on the recollections and assertions of witnesses, which contradicted the documentary evidence and raised issues of credibility.

[47] The proper approach, as settled by authority, is that where oral testimony is inconsistent with documentary evidence, the latter must prevail unless there are compelling reasons to disregard it. The failure to give precedence to the documents led to findings of fact that were unsustainable in law and, in our view, resulted in a miscarriage of justice.

[48] In light of both the documentary evidence adduced by the plaintiff, and contradicting oral testimony by the defendants, reference was made to the Federal Court case of *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] CLJU 119; [1979] 1 LNS 119, where it was stated by Chang Min Tat FJ as follows:

> *... the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence.* For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the

event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. *Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case.*

Plausibility should never be mistaken for veracity.

(emphasis added)

[49] We also found instructive the case of *Eastern & Oriental Hotel [1951] Sdn Bhd & Anor [1951] Sdn Bhd v. Ellarious George Fernandez & Anor And Another Case* [1988] 2 CLJ 734; [1988] 1 CLJ (Rep) 50; [1989] 1 MLJ 35, where Wan Hamzah SCJ in the Supreme Court, after quoting with approval the following observation made in *Armagas Ltd v. Mundogas SA (The Ocean Frost)* [1985] 1 Lloyds Rep 1 *"The Ocean Frost"* [1985] 1 Lloyds Rep 1, had stated:

It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents to the witnesses' motives, and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth, said:

In commercial cases there is usually a substantial body of contemporary documentary evidence.

This is not strictly speaking a commercial case, *but the relevancy of contemporaneous documents nevertheless holds true.*

(emphasis added)

[50] Furthermore, the defendants' case was premised on witnesses recounting what Raghavan had allegedly told them years earlier. Such statements constituted hearsay, as they were adduced to prove the truth of what was asserted, and not from the witnesses' own direct knowledge.

[51] Pursuant to s. 60 of the Evidence Act, oral evidence must be direct, and in the absence of any statutory exception under the Evidence Act, hearsay of this nature is inadmissible and carries no probative value. Section 60 of the Evidence Act reads:

Section 60 - Oral evidence must be direct

(1) Oral evidence shall in all cases whatever be direct, that is to say-

(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

(b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

(c) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

A (d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

(2) The opinions of experts expressed in any treatise commonly offered for sale and the grounds on which such opinions are held may be proved by the production of the treatise if the author is dead or cannot be found or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.

(3) If oral evidence refers to the existence or condition of any material thing including a document, the court may, if it thinks fit, require the production of that material thing or the document for its inspection.

[52] Even if such oral testimony was admissible, the reliability of such testimony was highly questionable, for it was difficult to conceive how the witnesses could accurately recall the precise details of a conversation said to have taken place decades ago.

[53] We are mindful that an appellate court ought to exercise caution before interfering with a trial judge's assessment of witnesses, as the trial judge enjoys the distinct advantage of observing them first-hand – their demeanour, tone, pauses, body language, and consistency. This principle, expounded in *Watt Or Thomas v. Thomas* [1947] AC 487 has been assimilated into Malaysian jurisprudence through several cases including *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] CLJU 32; [1978] 1 LNS 32; *UEM Group Bhd v. Genysis Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785, and *Ikris Bina Sdn Bhd v. Jianseng Construction Sdn Bhd* [2019] CLJU 1662; [2019] 1 LNS 1662.

[54] However, this does not mean that the hands of the appellate court are tied. The exception to the general rule mentioned above is when the findings are clearly wrong: *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163; [1996] 2 MLJ 517; or where crucial evidence has been misconstrued, or disregarded: *Muttar Masngud v. Lim Kim Chet & Anor* [1982] CLJ 107; [1982] CLJ (Rep) 237 or if the trial judge is shown to have misdirected himself on the evidence, or to have rejected evidence for a wrong reason, or to have drawn an inference from evidence which was equally capable of supporting a different inference, it then may be the duty of an appellate court to interfere: *Woon Ngee Yew & Ors v. Ng Yoon Thai & Ors* [1940] CLJU 119; [1940] 1 LNS 119; [1941] 10 MLJ (FMSR) 37.

[55] We also drew guidance from the case of *Paya Terubong Estates Sdn Bhd v. Pusaka Warisan Sdn Bhd* [1998] 2 CLJ 909; [1998] 2 MLJ 463, where it was stated by Gopal Sri Ram JCA (as he then was) in the following passage:

One can, of course, quite well appreciate an appellate court's reluctance to disturb the primary exercise of discretion. This is because a court of appeal in a matter such as the present does not possess an original discretion, its initial function being one of review only. *However, where, as in the present instance, it is amply demonstrated that the judge in whom the primary discretion is vested has failed to take into account relevant considerations, it is the duty of this court to say so and to intervene and set matters right by an exercise of its own discretion*.

(emphasis added)

[56] In *Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd* [2017] 5 CLJ 58; [2017] 3 MLJ 763, the principles of appellate intervention were distilled by the Court of Appeal, through Harmindar Singh Dhaliwal JCA (as he then was) in the following passages:

[20] Nevertheless there are occasions when appellate interference is warranted and these occasions have been well set out in numerous cases. Some of these occasions are:

(a) where the trial judge took into account irrelevant considerations and failed to give due weight to relevant considerations (see *Director of Forests & Anor v. Mau Kam Tong & Mau Kim Siong (the executors of the estate of Mau Ming, deceased) & Anor* and another appeal [2010] 3 CLJ 377; [2010] 3 MLJ 509);

(b) where there was **no proper evaluation of the evidence** by the trial judge (see *Lee Nyan Hon & Bros Sdn Bhd v. Metro Charm Sdn Bhd* [2009] 6 CLJ 626; [2009] 6 MLJ 1);

(c) where the decision arrived at by the trial court was **without judicial appreciation of the evidence** (see *Gan Yook Chin (P) & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1);

(d) where a trial court has so fundamentally misdirected itself, that no reasonable court which had properly directed itself and asked the correct questions, would have arrived at the same conclusion (see *Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v. Sri Seltra Sendirian Bhd* [2008] 2 CLJ 284; [2008] 2 MLJ 87);

(e) where the trial judge was plainly wrong in arriving at his decision see *Lee Ing Chin @ Lee Teck Seng v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97; 772 Malayan Law Journal [2017] 3 MLJ;

(f) where a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, **has not properly analysed the entirety of the evidence which was given before him** (see *First Count Sdn Bhd v. Wang Yew Logging & Plantation Sdn Bhd* [2013] CLJU 625; [2013] 4 MLJ 693 which followed the Privy Council case of *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] CLJU 40; [1984] 2 MLJ 165); and

A (g) where the judgment is based upon a wrong premise of fact or of law (see *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] CLJU 1416; [2012] 4 MLJ 149).

(emphasis added)

[57] In our respectful view, although the learned High Court Judge B regarded the defendants' witnesses as convincing and consistent, certain features of their account called for closer examination. For instance, if Ramaney were merely a trustee, and had no interest at all in the lands as claimed by the defendants, it was difficult to reconcile why Ramaney would have paid money to Thanama pursuant to the POAs; or why the sale and C purchase agreement would have been signed by both Ramaney and Ellusamy (Raghavan's representative) as purchasers; or why Ramaney would have executed the trust deeds in favour of the defendants; or why the defendants had subsequently signed statutory declarations acknowledging Ramaney's interest in the lands.

D **[58]** The documentary evidence squarely raised these issues, yet no reasons were provided as to why the learned High Court Judge chose to place reliance on the oral testimony in preference to the contemporaneous documentary evidence.

Whether There Was Misdirection On Burden And Standard Of Proof

E

[59] The defendants' case was founded entirely upon their oral testimony of a beneficial interest in all Lots 2259 to 2264, which they contended superseded the express terms of the trust deeds relating to the original three lots. On its face, however, the trust deeds supported Ramaney's entitlement to the half share across the original three lots.

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[60] It was our view, therefore, that the burden was not on the plaintiff to prove Ramaney's half share beneficial ownership, as that had already been established by the trust deeds, POAs, sale and purchase agreement, and statutory declarations. Rather, the burden was on the defendants to prove, on G a balance of probabilities that they are the beneficiaries to the whole share of the six lots. This was pursuant to s. 103 of the Evidence Act, which reads:

Section 103 – Burden of proof as to particular fact

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any H law that the proof of that fact shall lie on any particular person.

ILLUSTRATIONS

(a) A prosecutes B for theft and wishes the court to believe that B admitted the theft to C. A must prove the admission.

I (b) B wishes the court to believe that at the time in question he was elsewhere. He must prove it.

(emphasis added)

[61] In our view, inaccurate principles relating to the burden and standard of proof were imposed on the plaintiff, and in doing so, the learned High Court Judge arrived at findings that were inconsistent with the evidence before the Court.

Conclusion

[62] As such, after conducting a thorough examination of all the evidence presented to this court, encompassing both written and oral arguments from both parties, we found that the appeal should be allowed, with costs, on the basis that there was insufficient judicial appreciation of the documentary evidence; insufficient evaluation of oral evidence of the defendants in light of undisputed contemporaneous documents; and misdirection in the burden and standard of proof.

[63] Accordingly, this appeal is allowed on the alternative prayer. The defendants' beneficial interest measuring 1,114 square metres across Lots 2259 to 2261 shall be sold to the plaintiff at market value within six months from the date of this judgment, such value to be determined by a certified valuer appointed by the plaintiff at his own cost. In the event that the defendants fail or refuse to execute the requisite documents of transfer, the Registrar of the court is hereby authorised to execute the same on their behalf to give effect to this order.

[64] Costs to be awarded to the plaintiff in the amount of RM20,000 (subject to allocator).